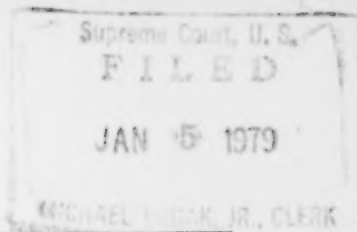


No. 78-790



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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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SHIPPERS DISPATCH, INC., PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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**WADE H. MCCREE, JR.**  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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Petitioner, a trucking company, was sued for wrongful death and personal injuries by plaintiffs who alleged that one of petitioner's truck driver employees had been negligent. Petitioner then filed a third-party complaint under the Federal Tort Claims Act, 28 U.S.C. 1346(b), seeking indemnification from the United States. Petitioner's theory was that it had hired the truck driver involved in the accident under the compulsion of a consent decree in a civil rights action initiated by the United States and that the government was therefore primarily responsible for the accident. Petitioner contends that the court of appeals erred in concluding that its complaint failed to state a cause of action. Petitioner also asserts that requiring it to assume financial responsibility for employees it hired pursuant to the consent decree amounts to an unconstitutional taking of property without just compensation. These claims are insubstantial.

1. In November 1975, Monica and Carol Malone filed suit against petitioner in state court, seeking to recover damages for the death of a relative and injuries to themselves resulting from a collision between their automobile and a truck driven by Willie Hall, petitioner's employee. Petitioner removed the action to the United States District Court for the Northern District of Ohio on the basis of diversity of citizenship. It then filed a third-party complaint against the United States under the Federal Tort Claims Act, alleging that it had been compelled to hire Hall pursuant to a consent decree entered in an equal employment case brought by the United States under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* *United States v. Trucking Employers, Inc.*, Civ. No. 74-453 (D. D.C., partial consent decree entered March 20, 1974). Petitioner claimed that it was entitled to indemnity from the United States on the ground that the decree, that mandated a goal of filling at least one-third of its driver vacancies with black and Hispanic drivers had increased its liability for trucking accidents, because drivers such as Hall would not have been hired under its previous standards.

The district court dismissed the third-party complaint for lack of subject matter jurisdiction, noting the "patent insufficiency" of the allegations as a basis for jurisdiction under the Federal Tort Claims Act (Pet. App. A10). The court of appeals affirmed, holding that the complaint failed to state a claim because it alleged no "negligent or wrongful conduct on the part of the United States" (*id.* at A5).<sup>1</sup> The court of appeals also noted that the government's pursuit of the civil rights action against

<sup>1</sup>The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(1) and did not reach the government's motion to dismiss under Fed. R. Civ. P. 12(b)(6) (Pet. App. A11). The court of appeals affirmed on the basis of Rule 12(b)(6) (*id.* at A3-A4).

petitioner was within the discretionary function exception to the waiver of sovereign immunity in the Tort Claims Act (*ibid.*).

2. The court of appeals' decision is correct and does not warrant further review. The Federal Tort Claims Act may be invoked only for a " 'negligent or wrongful act or omission' " of a government employee acting within the scope of his employment. *Dalehite v. United States*, 346 U.S. 15, 44 (1953). Accord, *Laird v. Nelms*, 406 U.S. 797, 789 (1972). Petitioner's complaint alleged only that the United States had filed a Title VII action that culminated in a consent decree pursuant to which petitioner hired the truck driver subsequently involved in the accident with the Malones and that the decree imposed hiring standards lower than those petitioner had customarily maintained. It alleged no wrongful or negligent act of any government employee. Hence, the complaint was properly dismissed for failure to state a claim.

Moreover, even if, as petitioner asserts (Pet. 5-6), his complaint should have been read to allege negligence by an agent of the government, petitioner still would not have presented a meritorious claim under the Federal Tort Claims Act. As the court of appeals correctly observed, the acts of government employees in planning, prosecuting, and settling a Title VII enforcement action necessarily fall within the discretionary function exception to the Act, 28 U.S.C. 2680(a). *Midwest Growers Co-op Corp. v. Kirkemo*, 533 F. 2d 455, 465 (9th Cir. 1976); *Smith v. United States*, 375 F. 2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967); *United States v. Faneca*, 332 F. 2d 872 (5th Cir. 1964).<sup>2</sup>

<sup>2</sup>28 U.S.C. 2680(a), in pertinent part, excludes from the coverage of the Act "[a]ny claim \* \* \* based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." Petitioner's

Finally, petitioner's contention (Pet. 9-10) that the consent decree exposed it to increased liability for accident claims and thereby constituted a taking without just compensation was not raised below and should not be considered by this Court. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977). This contention is, in any event, wholly insubstantial. If petitioner felt aggrieved by the actions of the government in the Title VII lawsuit, its remedy was to defend its position in that lawsuit and to appeal if it did not prevail. The propriety of the consent decree cannot be collaterally attacked in an action under the Federal Tort Claims Act. Furthermore, the Just Compensation Clause is inapplicable here because it refers "only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870). See also *Penn Central Transportation Co. v. New York City*, No. 77-444 (June 26, 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

JANUARY 1979

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argument analogizing the present case to medical malpractice actions is unsound (Pet. 8). Decisions concerning medical treatment are not discretionary policy judgments analogous to decisions concerning what relief is necessary to vindicate rights under federal statutes.